No. 90-819

In The

Supreme Court of the United States

October Term, 1990

JOHN CARR, et al.,

Petitioners,

v.

PACIFIC MARITIME ASSOCIATION, et al.,

Respondents.

GREG BROOKS, JUDY CHECKERS, et al.,

Petitioners,

vs.

PACIFIC MARITIME ASSOCIATION, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM J. KILBERG
DENNIS A. GLADWELL
GIBSON, DUNN & CRUTCHER
800 Newport Center Drive
Suite 700
Newport Beach, CA 92660
(714) 759-3800
Attorneys for Respondent Pacific Maritime Association

WILLIAM H. CARDER
RICHARD S. ZUCKERMAN
ROBERT REMAR
LEONARD, CARDER, NATHAN, ZUCKERMAN, ROSS, CHIN & REMAR
1188 Franklin Street,
Ste. 201
San Francisco, CA 94109
(415) 771-6400
Attorneys for Respondents ILWU and Locals 13 and 63

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The question presented is whether Petitioners' failure to exhaust the grievance procedures under a collective bargaining agreement, more accurately, their failure to file *timely* grievances, is excused because of (1) alleged bias of the grievance committees; (2) the alleged inadequacy of the arbitration procedures; (3) the alleged repudiation, by the grievance committees, of their own procedures; (4) the Union's alleged breach of its duty of fair representation; and (5) the alleged delay in handling grievances that were filed.[1]

---

[1] These were the key issues addressed by the majority in the Ninth Circuit's Opinion.

LIST OF PARTIES

The Petitioners before this Court are listed in the Appendix to the Petition for Writ of Certiorari.

Respondents before this Court are the Pacific Maritime Association (PMA), the International Longshoremen's and Warehousemen's Union (ILWU) and two of its Locals, Local 13 and Local 63.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

For its Statement of the Case, Respondents incorporate the opinion of the majority in this case. *Carr v. Pac. Maritime Ass'n., et al.*, 904 F.2d 1313, 1315-17 (9th Cir. 1990).

REASONS FOR DENYING THE WRIT

I.

SUMMARY OF ARGUMENT

Certiorari should be denied for three reasons. First, there is no *conflict* between the Ninth Circuit's opinion in *Carr* and any decision of this Court regarding exhaustion of contractual remedies. Sup. Ct. R. 17.1(c); *see United States v. Doe*, 465 U.S. 605, 610 (1984). In line with this Court's decisions in this area, the *Carr* opinion does not require, contrary to Petitioners' assertion, that a grievant completely exhaust the grievance procedure in order to preserve a federal action for breach of contract. The *Carr* majority requires only that a grievant notify the grievance panel of his allegations within the time limits set by the collective bargaining agreement.

Second, there is no conflict among the circuits addressing the issue of when a grievant is excused from exhausting his contractual remedies. Sup. Ct. R. 17.1(a); *see McElroy v. United States*, 455 U.S. 642, 643 (1982). The First, Second and Third Circuit cases Petitioner attempts to distinguish all hold that a grievant waives a claim of bias if he fails to raise his objection when the grievance

committee convenes. The *Carr* Opinion follows these decisions.

Third, certiorari would be inappropriate because the Petition seeks review of factual issues that were raised only by way of allegation, in the context of a summary judgment proceeding, which held in favor of these Respondents based on undisputed facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see Texas v. Mead*, 465 U.S. 1041 (1984). The arbitrator, district court and the Ninth Circuit essentially addressed only one issue: the untimeliness of Petitioners' grievances. The district court did deal briefly with Petitioners' lack of evidence of bias and nepotism, but only to observe that their "evidence" was allegation only and speculative. See, Petitioners' Appendix, District Court Findings No. 4, Conclusions of Law No. 7. Thus under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), Petitioners had no evidence sufficient to raise a material and triable issue of fact. The Petition seeks to bypass the issue of timeliness and present instead, the merits of their claims for *de novo* review by the Court, i.e. whether the PMA/ILWU joint grievance committees were biased, based on nepotism, as respects some or all of the 128 grievants who comprise the Petitioners here.

Petitioners' central contention, that the grievance procedures were inadequate, biased, or futile, is little more than a theoretical discussion about possible inadequacies of a contractual process Petitioners never used to test these allegations. As we know, there were two possible grievance routes: one based on discrimination claims

(Section 13), which ultimately is heard by a neutral arbitrator (Sam Kagel); and one based on all other grounds, which is heard and decided by joint committees of the PMA/ILWU, unless the committees disagree, in which case Kagel makes the final decision. Both grievance procedures required the grievant to file a claim within ten days of the event being grieved. Only forty one of the 128 *Carr* Petitioners filed individual timely grievances, and in only one case were any improprieties regarding the registration process or the bias or futility of the joint grievance committees alleged.[2]

The October, 1985 grievances that did raise nepotism and bias were untimely by five months and thus the grievance process, the Kagel arbitration, and the district court never got beyond the threshold issue of timeliness and exhaustion. Thus, not only are these issues not before this Court, Petitioners have never shown how the possible bias of the grievance committees related factually to their failure to file timely grievances, a necessary factual predicate to advance the arguments they assert here.

Finally, Petitioners' contention that delays in processing grievances excused them from exhaustion is not properly before this Court. This claim was never raised in the complaint, and the claim is based on what occurred after Petitioners resorted to federal court. For these reasons, Respondents respectfully request that the Petition be denied.

---

[2] The grievances essentially dealt with scoring and crediting issues. (CR 28, pp. 55).

II.

THE QUESTION PRESENTED BY PETITIONERS IS NOT APPROPRIATE FOR REVIEW BY THIS COURT

A. The Ninth Circuit's Opinion Presents No Conflict With Any Decision of This Court or of Another Circuit

Petitioners' contention that the Ninth Circuit's Opinion conflicts with decisions of this Court or of those from other circuits is erroneous. The *Carr* Opinion is fully consonant with this Court's decisions on exhaustion of contractual remedies, including *Glover v. St. Louis – San Francisco Railway Co.*, 393 U.S. 324, 331 (1969); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 657 (1965); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976); and *Vaca v. Sipes*, 386 U.S. 171, 184-185 (1967). Far from presenting an inter-circuit conflict, the *Carr* opinion is in accord with the circuit court cases Petitioners attempt to distinguish, including *Early v. Eastern Transfer*, 699 F.2d 552, 558 (1st Cir.), *cert. denied*, 464 U.S. 824 (1983); *Cook Indus., Inc. v. C. Itoh & Co., (America) Inc.*, 449 F.2d 106, 107-08 (2d Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); and *United Steelworkers of Am. Local 1913 v. Union R.R. Co.*, 648 F.2d 905, 913-14 (3d Cir. 1981).

1. This case is consistent with this Court's prior decisions on exhaustion of remedies.

Citing Judge Hall's dissent, Petitioners assert that the Ninth Circuit's Opinion "effectively overrules this Court's Opinion in *Glover*. . . ." (Petition p. 33) That is not true. In *Glover*, this Court created an exception to the exhaustion requirement by excusing a failure to fully

exhaust contractual remedies in situations where a formal effort to pursue such remedies would be completely futile. *Glover*, 393 U.S. at 327.

The plaintiffs in *Glover* had made numerous complaints concerning discrimination both to representatives of the union and the company, and had asked the union to process a grievance on their behalf under the collective bargaining agreement. *Id.* at 326. In response to these complaints, members of the union and the company allegedly ignored the complaints, made disparaging comments about the plaintiffs, and retaliated through intimidation and threats. *Id.* at 326-27. This Court held that plaintiffs' unsuccessful attempts to invoke contractual remedies established the futility of complying with the exhaustion requirement. *Id.* at 331. Moreover, this Court reaffirmed the basic rule that a grievant must in good faith *attempt* to exhaust contractual remedies: "Under these circumstances, the *attempt* to exhaust contractual remedies, required under *Maddox*, is easily satisfied by petitioner's repeated complaints to company and union officials, and no time-consuming formalities should be demanded of them." *Id.*

Nothing in *Glover* suggests that a grievant is excused from attempting to invoke contractual grievance procedures simply by claiming, *after the fact*, that his attempt would have been futile. Rather, *Glover* requires a litigant to show some good faith *attempt* to exhaust his remedy under the contract before he will be excused to proceed with a federal lawsuit.

The Ninth Circuit's holding in this respect is consistent with *Glover* since the majority does not, as the dissent

suggests, require a grievant to completely exhaust the grievance procedure. Petitioners could have preserved their bias claim by simply notifying the Port LRC "in a timely manner that they believed the grievance procedure was biased so that the Port LRC might have an opportunity to act on that complaint." *Carr*, 904 F.2d at 1318 n.7. Petitioners argue at length that it took time and effort to gather their evidence of bias. They miss the point. The Ninth Circuit suggests only that the issue of bias be timely raised, not that evidence be presented contemporaneously therewith. *Carr*, 904 F.2d at 1318.

Petitioners' contention that the *Carr* Opinion contradicts this Court's decision in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), and *Vaca v. Sipes*, 386 U.S. 171 (1967) is also wrong. In *Maddox*, this Court prevented an employee from filing an action for breach of the collective bargaining agreement when he made no effort to resort to the grievance procedure. *Maddox*, 379 U.S. at 657. In *Hines*, this Court held that a failure to exhaust would be excused if a union breached the duty of fair representation in a way that "seriously undermine[d] the integrity of the arbitral process." *Hines*, 424 U.S. at 567. In *Vaca*, this court held that a wrongfully discharged employee could not obtain damages from the union since the union's failure to take his grievance to arbitration was not done in bad faith. Thus, none of these decisions run contrary to the holding in *Carr*. In fact, *Carr* merely applies these established principles to the case at hand. While Petitioners may believe the majority has misapplied these principles, this fact alone would not warrant review here.

2. There is no inter-circuit conflict over the exhaustion doctrine.

Petitioners claim that *Carr* conflicts with decisions in three other circuits. (Petition p. 34) On the contrary, these decisions, cited by Petitioners, each hold that a grievant must object to the bias of a grievance committee when the committee convenes or the objection is waived. *Early v. Eastern Transfer*, 699 F.2d 552, 558 (1st Cir. 1983), *cert. denied*, 464 U.S. 824 (1983) ("[W]e will not entertain a claim of personal bias where it could have been but was not raised at the hearing to which it applies."); *Cook Indus., Inc. v. C. Itoh & Co., Inc.*, 449 F.2d 106, 107-08 (2d Cir. 1971), *cert. denied*, 405 U.S. 921 (1972) ("Appellant cannot remain silent, raising no objection during the course of the arbitration proceeding, and when an award adverse to him has been handed down complain of a situation of which he had knowledge from the first."); *United Steelworkers of Am. Local 1913 v. Union R.R. Co.*, 648 F.2d 905, 913-14 (3d Cir. 1981) ("When the reasons supporting an objection are known beforehand, a party may not wait to make an objection to the qualifications of a Board member until after an unfavorable award has been made.")

Like the plaintiffs in the cases cited above, Petitioners knew of the allegations of favoritism and bias well before the ten-day deadline. The arbitrator specifically found that " . . . the Grievants in this present arbitration could have filed grievances prior to May 15, 1985, in which they could have alleged discrimination." (CR 31, pp. 17-18). A notice specifically setting forth the ten-day appeal period was posted (CR 28, pp. 54-55), was seen by some plaintiffs, and widely discussed. (See Petitioners' Appendix,

District Court Findings, No. 8) And if a court were inclined to root around in the record there were innumerable admissions by Petitioners, in their depositions, that they believed prior to the May deadline, that they had been unfairly treated. (CR 30, Depositions of Carr, pp. 29-30; Balsley, pp. 23-24; Miller, p. 23; Regan, p. 23). The district court specifically found that "allegations of improprieties were common knowledge among members of the casual workforce" (of which the Petitioners were members). Petitioners' Appendix, District Court Findings, No. 4

The real question, with which Petitioners never come to grips, is why they missed the grievance deadline of May 15, 1985 in the first place. This is *the* reason both their section 13 claims and their non section 13 claims were not considered. Yet, the application each longshoreman filled out clearly stated:

> "Any claim attacking the action of any labor relations committee . . . must be filed within ten (10) days of the action giving rise to the grievance. The ten (10) day limit on the filing of the grievance means that if it is not filed within the time, the issue can never be raised."

(CR 36, pp. 7-8, 53).

B. The Question Presented Introduces No Issues Worthy of Review by this Court

1. Petitioners' allegations of bias do not merit the Court's review.

It would little serve the interests of this Court to weigh, as a trial court, Petitioners' allegations of bias, a task never undertaken by an independent arbitrator, the

district court, or the Ninth Circuit. The untimeliness of the group grievances was the key issue addressed by those forums. Forty-one of the 128 instant Petitioners in these consolidated cases filed timely individual appeals when they were denied registration. Only one of them claimed bias. As discussed above, the Ninth Circuit correctly observed that these Petitioners waived their right to claim bias on the part of a grievance committee since they failed to raise the objection in their appeals. *Carr*, 904 F.2d at 1318. A fortiori, the remaining seventy-seven Petitioners in these cases stand in no better position, having failed to file a timely grievance.

In addition, Petitioners' contention that it would have been futile to file a timely grievance must clearly be wrong as a matter of law. Of the 318 individual appeals filed by unsuccessful applicants, thirty were subsequently registered. (CR 28, p. 55; CR 31, pp. 12-13). A process that grants ten percent of the appeals made is hardly futile.

Moreover, when parties to a collective bargaining agreement have agreed upon a particular method of dispute resolution, it is presumed fair. *Sheet Metal Wkrs. Intern. Ass'n v. Kinney Air Cond.*, 756 F.2d 742, 746 (9th Cir. 1985). Only upon a clear showing of "fraud or bad faith or demonstrated bias or collusion" will an arbitration or joint board decision be overturned. *See Early v. Eastern Transfer*, 699 F.2d 552, 558 (1st Cir.) *cert. denied*, 464 U.S. 824 (1983). No decision of this Court, or of any circuit, holds that a plaintiff may be excused from attempting to resort to contractual grievance procedures by claiming bias simply because of the possibility that a member of the grievance panel, that would hear their claim, might be biased against them.

In their statement of grievances, Petitioners did not identify any particular Local 13 or Local 63 representative who participated in the scoring or interviewing process as biased in favor or against any particular applicant. Nor did Petitioners come forward with evidence during the summary judgment phase, to show that any of those supposedly biased Local representatives in fact participated in denying their grievances. At most, Petitioners simply alleged that certain Union and PMA officials, including some members of the Joint Port LRC, had relatives who were registered while Petitioners did not, much of which was based on hearsay or speculation as the district court so found.

Even addressing the merits, it is by no means surprising that the registration of several hundred new Class "B" longshoremen and clerks would attract large numbers of applicants who are relatives, friends or neighbors of union members. These are individuals most likely to have knowledge of the excellent wages, benefits and working conditions enjoyed by those registered under the labor agreement. Additionally, Petitioners overlook the fact that a large number of applicants who were related to union members were denied registration.[3]

---

[3] Additionally, Judge Hall's dissent in *Carr* states in conclusory fashion that "there have been at least as many complaints of bias against the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, as evidenced by the long list of lawsuits (including this one) filed against them on this ground." *Carr*, 904 F.2d at 1323 n.5 (Hall, J. dissenting). As evidence of this, Judge Hall simply cites various Ninth Circuit opinions concerning litigation involving

(Continued on following page)

2. Petitioners' allegations that the grievance and arbitration procedures in the collective bargaining agreement are inadequate do not merit review.

Again, Petitioners seek review of supposed theoretical weaknesses in a grievance procedure not utilized. Petitioners assert that they should be excused from the exhaustion requirement because the grievance and arbitration mechanisms are inadequate by not providing all

---

(Continued from previous page)

the Pacific Maritime Association. Few of these cases, however, involve the kind of bias belatedly raised by the Petitioners herein. Three of those cases involve allegations of racial discrimination. *See Griffin v. Pac. Maritime Ass'n.*, 478 F.2d 1118 (9th Cir.) (per curium), *cert. denied*, 414 U.S. 859 (1973) (claims of racial discrimination dismissed as time-barred and for failure to exhaust administrative remedies); *Gibson v. Local 40, Super Cargoes & Checkers, ILWU*, 543 F.2d 1259 (9th Cir. 1976), (claim of racial discrimination dismissed on merits); *Scott v. Pac. Maritime Ass'n.*, 695 F.2d 1199 (9th Cir. 1983) (claim of racial discrimination). Another case involves discrimination *against* a union officer. *Local 13, ILWU v. Pac. Maritime Ass'n.*, 441 F.2d 1061 (9th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972). In other cases, the Ninth Circuit dismissed claims by union members or unsuccessful applicants for failure to exhaust contractual remedies. *See Alexander v. Pac. Maritime Ass'n.*, 434 F.2d 281 (9th Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971); *Beriault v. Local 40, Super Cargoes & Checkers, ILWU*, 501 F.2d 258 (9th Cir. 1974) (claims of breach of collective bargaining agreement dismissed for failure to exhaust collective bargaining agreement remedies); *Ritza v. ILWU*, 837 F.2d 365 (9th Cir. 1988) (per curiam) (upholding dismissal based on failure to exhaust administrative remedies). These cases do not establish, as Judge Hall maintains, that the PMA grievance and arbitration procedures are *per se* biased. Moreover, given the fact that the PMA/ILWU contract covers all west coast longshoremen, six or seven cases, over the last twenty years, regarding the issues of exhaustion or discrimination, would be expected.

of the discovery devices, assistance of counsel, subpoena power, and additional time to investigate prior to the initial filing of their grievance. (Petition at 45-53) Essentially, Petitioners are complaining that the private grievance procedure does not mirror federal court procedure. Federal labor laws, however, "reflect a decided preference for private settlement of labor disputes without government intervention." *United Paperworkers Int'l. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). The fact that the contractual remedies in this case do not mirror federal procedure is presumably a choice made within the collective bargaining process. To the extent that an agreement does not violate the duty of fair representation, the parties to the contract may create remedies which they believe most fairly and economically preserve the rights of both parties. Importantly, the Ninth Circuit correctly observed that none of these "flaws" affected Petitioners' failure to timely invoke the contractual grievance procedure. Petitioners were only required to notify the Port LRC of the alleged bias. *Carr*, 904 F.2d at 1318.

In this case, any realistic appraisal of the grievance procedures afforded Petitioners affirms its appropriateness. Respondents processed more than 22,000 applications to fill approximately 387 positions during the 1984 registration. At some point in time, it was necessary to bring this expensive and time-consuming process to an end. To permit pretrial discovery, and the right to an attorney for every potential job applicant would be to eviscerate the purposes of industrial arbitration. The PMA/ILWU collective bargaining agreement is well within the mainstream of successful grievance procedures

which provide speedy, direct, common sense paths to dispute resolution.

3. Petitioners' contention that they are excused from the exhaustion requirement because the Port LRC "repudiated" the grievance procedure does not merit review.

Petitioners' contention that Respondents repudiated the grievance procedure because they "discouraged" appeals presents an issue of narrow interest inappropriate for review by this Court. That the Port LRC "did not wish to solicit large numbers of appeals" hardly amounts to a repudiation of the grievance procedure. Given the 22,000 applications for registration, the notice of the right to appeal contained in each application was a reasonable and sufficient measure.

The arbitrator's decision finds that forty-one of the 128 plaintiffs filed individual grievances, (CR 28, p. 55; CR 14A, pp. 2-41) all of which were heard. As to Petitioners' group grievances, not only did the PMA and ILWU process those grievances, but the section 13 (discrimination claims) were submitted to the neutral arbitrator for his decision. Had the arbitrator ruled that the grievances were timely, Petitioners' claims would have been heard on the merits. Thus, neither the PMA nor the ILWU repudiated the grievance procedure.

4. Petitioners' contention that they are excused from exhausting contract remedies because of the Union's alleged breach of its duty of fair representation does not merit review.

Petitioners misapply the doctrine that excuses a grievant from exhausting contractual grievance procedures based on a union's breach of the duty of fair

representation. There are two situations in which a breach of the duty of fair representation will operate to excuse the exhaustion requirement. First, where "the union has sole power under the contract to invoke the higher stages of the grievance procedure *and* . . . the employee/plaintiff has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance." *Vaca v. Sipes*, 386 U.S. 171, 185 (1967) (emphasis in original). Second, where grievants allege breach of the duty of fair representation with regard to negotiating the collective bargaining agreement. *Williams v. Pac. Maritime Ass'n.*, 617 F.2d 1321, 1328-30 (9th Cir. 1980), *cert. denied*, 449 U.S. 1101 (1981).

Neither exception excuses exhaustion in this case. Both with respect to section 13 and nonsection 13 grievances, unsuccessful applicants could invoke the grievance procedure without the assistance of the union. Second, Petitioners are not claiming that the union breached its duty of fair representation with regard to **negotiation** of the collective bargaining agreement. Petitioners only contend that certain union members unfairly reviewed their applications. As noted in *Carr*, "This allegation neither excuses plaintiffs' failure to file their grievances on time or to state their complaints with specificity, nor justifies their decision to sidestep the grievance process." *Carr*, 904 F.2d at 1320.

5. Petitioners' argument that they are excused from the exhaustion requirement because of delays in processing grievances is not worthy of review.

Petitioners' allegations concerning delay in the grievance procedure is not properly before this Court. As the Ninth Circuit observed, such allegations were not raised in the complaint. *Carr*, 904 F.2d at 1320. Indeed, no Petitioner has ever filed a complaint or attempted to amend a complaint based upon delay in the processing of their grievance. The majority in *Carr* correctly observed that Petitioners "base their assertion of unreasonable delay on what occurred after, rather than prior to, their resort to district court." *Carr*, 904 F.2d at 1320.

CONCLUSION

Missing from this case is any ground warranting the granting of certiorari. No conflict with any opinion of this Court exists. No inter-circuit conflict exists. Petitioners offer no reason why this Court should reexamine an area of the law that is well settled. They are seeking a review of the merits even though their claims, being time

barred, have never been addressed in any other forum. As such, the Petition should be denied.

DATED: January 14, 1991

Respectfully submitted,

WILLIAM J. KILBERG
DENNIS A. GLADWELL
GIBSON, DUNN & CRUTCHER

By: William J. Kilberg

Attorneys for Respondent
Pacific Maritime Association

WILLIAM H. CARDER
RICHARD S. ZUCKERMAN
ROBERT REMAR
LEONARD, CARDER, NATHAN, ZUCKERMAN, ROSS, CHIN & REMAR

By: Richard S. Zuckerman

Attorneys for Respondents
ILWU and Locals 13 and 63